

§ 242.48

(d) *Advances.* (1) Before an advance for a building component stored off-site is insured:

(i) The mortgagor shall:

(A) Obtain a bill of sale for the component;

(B) Give the mortgagee a security agreement; and

(C) File a financing statement in accordance with the Uniform Commercial Code; and

(ii) The mortgagee shall warrant to HUD that the security instruments are a first lien on the building components covered by the instruments except for such other liens or encumbrances as may be approved by HUD.

(2) Before each advance for building components stored off-site is insured, the mortgagor's architect shall certify to HUD that the components, in their intended use, comply with HUD-approved contract plans and specifications. Under those circumstances permitted by HUD in which there is no architect, compliance with the HUD-approved contract plans and specifications shall be determined by HUD.

(3) Advances may be made only for components stored off-site in a quantity required to permit uninterrupted installation at the site.

(4) At no time shall the invoice value of building components being stored off-site, for which advances have been HUD insured, represent more than 50 percent of the total estimated construction costs for the insured mortgaged project as specified in the construction contract. Notwithstanding the preceding sentence and other regulatory requirements that set bonding requirements, the percentage of total estimated construction costs insured by advances under this section may exceed 25 percent but not 50 percent if the mortgagor furnishes assurance of completion in the form of a corporate surety bond for the payment and performance each in the amount of 100 percent of the amount of the construction contract. In no event will insurance of advances for components stored off-site be made in the absence of a payment and a performance bond.

(5) No single advance that is to be insured shall be in an amount less than \$10,000.

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§ 242.48 Insured advances for certain equipment and long lead items.

The Commissioner may allow advances for certain pieces of equipment or other construction materials for which a manufacturer, fabricator, or other source requires an interim payment(s) in order to assure the timely manufacture or fabrication and delivery to the project site. Such advances can be made only if a bill of sale or an invoice describes the material or equipment and its completion and delivery dates in no uncertain terms, and that such displayed timetable is necessary to meet the requirements of the overall construction schedule cited in the construction contract.

§ 242.49 Funds and finances: deposits and letters of credit.

(a) *Deposits.* Where HUD requires the mortgagor to make a deposit of cash or securities, such deposit shall be with the mortgagee or a depository acceptable to the mortgagee. Any such deposit shall be held in a separate account for and on behalf of the mortgagor, and shall be the responsibility of the mortgagee.

(b) *Letter of credit.* Where the use of a letter of credit is acceptable to HUD in lieu of a deposit of cash or securities, the letter of credit shall be issued to the mortgagee by a banking institution acceptable to the lender. The mortgagee shall be responsible to HUD for collection under the letter of credit. In the event a demand for payment thereunder is not immediately met, the mortgagee shall forthwith provide a cash deposit equivalent to the undrawn balance of the letter of credit.

(c) *Mortgagee not issuer.* The mortgagee of record may not be the issuer of the letter of credit without the prior written consent of HUD.

§ 242.50 Funds and finances: off-site utilities and streets.

The Commissioner shall require assurance of completion of off-site public utilities and streets in all cases, except where a municipality or other public body has by agreement acceptable to HUD agreed to install such utilities and streets without cost to the mortgagor. Where such assurance is required, it shall be in the form of a cash

escrow deposit, a letter of credit, the retention of a specified amount of mortgage proceeds by the mortgagee, or a combination thereof. In any case, the amount of deposit or retained cash (or both) must be sufficient to cover the cost of off-site utilities and streets. If a cash escrow is used, it shall be deposited with the mortgagee or with an acceptable trustee or escrow agent designated by the mortgagee. If mortgage proceeds are used, the mortgagee shall retain under terms approved by HUD, rather than disburse at the initial closing of the mortgage, a sufficient portion of the mortgage proceeds allocated to land in the project analysis. As additional assurance, HUD may also require a surety company bond or bonds.

[72 FR 67546, Nov. 28, 2007, as amended at 73 FR 35923, June 25, 2008]

§ 242.51 Funds and finances: Insured advances and assurance of completion.

(a) Where the estimated cost of construction or substantial rehabilitation is more than \$500,000, the mortgagor shall furnish assurance of completion in the form of corporate surety bonds for payment and performance, each in the minimum amount of 100 percent of the construction contract (or Guaranteed Maximum Price, in the case of construction management) and each satisfactory to HUD.

(b) All types of assurance of completion shall be on forms approved by HUD. All surety companies executing a bond and all parties executing a personal indemnity agreement must be satisfactory to HUD.

(c) A mortgagee may prescribe more stringent requirements for assurance of completion than the minimum requirements provided for in this section.

§ 242.52 Construction contracts.

(a) *Awarding of contract.* A contract for the construction or substantial rehabilitation of a hospital shall be entered into by a mortgagor, with a builder selected by a competitive bidding procedure acceptable to HUD.

(b) *Form of contract.* The construction contract shall be: A lump sum form providing for payment of a specified amount; a construction management

contract with a guaranteed maximum price, the final costs of which are subject to a certification acceptable to HUD; a design-build contract with terms and certification requirements acceptable to HUD; or such other form of contract as may be acceptable to HUD.

(c) *Competitive bidding.* A competitive bidding procedure acceptable to HUD must be used in the selection of bidders to perform work or otherwise provide service to the project, the costs of which are included in any form of construction contract cited in paragraph (b) of this section. Fixed equipment not included in the construction contract, and movable equipment, may be purchased by securing quotations or by using competitive bidding procedures.

[72 FR 67546, Nov. 28, 2007, as amended at 73 FR 35923, June 25, 2008]

§ 242.53 Excluded contractors.

(a) Contracts relating to the construction of the project shall not be made with any person or entity that has been excluded from participation in federal programs, including but not limited to: A general contractor, a subcontractor, or construction manager (or any firm, corporation, partnership, or association in which such contractor, subcontractor, or construction manager has a substantial interest). Before entering into contracts with any such person or entity, owners must consult the government-wide list of excluded parties, and any list of excluded parties maintained by HUD.

(b) Contracts relating to the construction of the project shall not be made with a general contractor that has an identity of interest, as defined by HUD, with the mortgagor or mortgagee.

(c) If HUD determines that a contract has been made contrary to the requirements of paragraphs (a) or (b) of this section and so notifies the mortgagee, HUD will require the contractor or construction manager to cost-certify and may require other remedial action in addition to taking enforcement action, as HUD deems appropriate.